IN THE

Supreme Court of the United States

October Term, 1965

JAN 8 1966

JOHN F. DAVIS, CLERK

No. 210

JAMES T. STEVENS,

Petitioner,

against

CHARLES A. MARKS, Justice of the Supreme Court of the State of New York, County of New York,

Respondent.

On Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

No. 290

JAMES T. STEVENS,

Petitioner,

against

JOHN J. McCLOSKEY, Sheriff of New York City,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

Opinions Below

No. 210

The opinion of the Appellate Division is reported at 22 App. Div. 2d 683 (1st Dept. 1964) (210 R. 42-3).* The order denying leave to appeal to the New York Court of Appeals is reported at 15 N. Y. 2d 483 (1965). The opinion of District Judge HERLANDS denying petitioner's motion for a writ of habeas corpus will be found at 234 F. Supp. 25 (S. D. N. Y. 1964) (290 R. 39-42).**

No. 290

The opinion of District Judge WEINFELD, denying petitioner's motion for a writ of habeas corpus, is reported at 239 F. Supp. 419 (S. D. N. Y. 1965) (290 R. 43-50). The opinion of the United States Court of Appeals for the Second Circuit affirming the order is reported at 345 F. 2d 305 (1965) (290 R. 54-63).

Question Presented

The question presented for review by this Court, a question common to both cases, has been propounded as follows:

> "Is Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution

* References to the record in No. 210 *Stevens* v. *Marks* will appear as follows: 210 R. ——.

** References to the record in No. 290 *Stevens* v. *McCloskey* will appear as follows: 290 R. ——.

in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?"

The Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V:

> "No person shall * * * be compelled in any criminal case to be a witness against himself * * *."

United States Constitution, Amendment XIV, Section 1:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitution, Article I Section 6 provides, in part, that no person shall:

> "be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to

sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty, or property without due process of law."

The New York City Charter, Section 1123:

"Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (*Derived from fromer* §903.)"

§381 of the Penal Law provides insofar as relevant as follows:

> "2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

§2447 of the Penal Law entitled "witnesses' immunity" provides as follows:

> "1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for here."

Subdivisions 2 and 3 of this statute define "immunity" and "competent authority."

No. 210: Statement

This is a writ of certiorari to review an order of the Appellate Division of the Supreme Court of the State of New York, First Department [22 App. Div. 2d 683 (1964)], which dismissed, with an opinion, a petition for an order pursuant to the provisions of Section 7801 of the Civil Practice Law and Rules and Section 752 of the Judiciary Law, seeking review of a judgment of the Supreme Court of the State of New York, County of New York (MARKS, J.) rendered July 28, 1964, summarily adjudging petitioner to be in CONTEMPT OF COURT (Judiciary Law, §§750, 751) and sentencing him to thirty days' imprisonment in civil jail and to pay a fine of two hundred and fifty dollars.

No. 290: Statement

This is a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit [LUMBARD, C.J.; SWAN and KAUFMAN, JJ.] affirming, with an opinion, an order of the United States District Court for the Southern District of New York [WEINFELD, J.] denying, with an opinion, a motion for a writ of habeas corpus addressed to an order of the Supreme Court of the State of New York, County of New York [SCHWEITZER, J.] adjudicating the petitioner guilty of criminal contempt of court [Judiciary Law §§750, 751] and sentencing him to be imprisoned in civil jail for a term of thirty days and to pay a fine of two hundred and fifty dollars, or, in default thereof, to serve an additional term of thirty days in civil jail.

The Facts

The First Contempt Conviction

The petitioner, **James T. Stevens,** was a lieutenant in the Police Department of the City of New York; he had been on the force for eighteen years (210 R. 4). On June 26, 1964, he was subpoenaed to appear before a New York County grand jury investigating allegations of bribery and corruption in the Police Department (210 R. 3, 8-9). Prior to being sworn as a witness before that body, the petitioner was advised by an assistant district attorney that the grand jury was inquiring into the crimes of bribery of a public officer and conspiracy to commit that crime (210 R. 9); that he, Stevens, had been called not as a witness but as a "potential defendant" (*id.*); that, under the United States Constitution, he had the right to refuse to answer any questions that might tend to incriminate him (*id.*); that, under the State Constitution and City Charter, a public officer is "required, if he desires to continue to hold his public position," to sign a limited waiver of immunity (210 R. 10); that if the waiver was signed and an indictment voted against him, Stevens' testimony "can and will be used" against him (*id.*). To each of these items, the petitioner signified his understanding; he then announced he was "prepared to sign" the waiver and was sworn (*id.*). Stevens then identified his signature on a document which he understood to be a waiver of immunity whose import he knew (210 R. 10-11). The waiver stipulated as follows:

> "I, Lt. James T. Stevens residing at 164 Engert Ave., Bklyn., occupying the office of Police Officer in

> the Police Dept. of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury." (210 R. 20)

He was given a financial questionaire, instructed to complete it, and told to return on a later date (210 R. 10-11).

On July 15, 1964, the petitioner appeared before another grand jury where, before being sworn, he identified himself, supplied his present and past police assignments, and acknowledged having signed a limited waiver before the June grand jury (210 R. 12). He was told the nature of the investigation in the July jury and was asked whether he would sign a limited waiver (210 R. 13). The petitioner refused (*id.*). He was told that, although he had the constitutional privilege against self-incrimination which he could invoke "at any time," if he did so he would be "subject to forfeiture" of his public position under the Constitution of New York and the City Charter (210 R. 13). He was also reminded of his waiver executed before the June jury, which the petitioner announced he intended to "withdraw" (210 R. 14). He was then excused. By letter dated

the same day, petitioner was informed that, "having refused to waive immunity from prosecution," his employment as a police officer had been terminated pursuant to the provisions of Section 1123 of the New York City Charter (210 R. 21).

On July 22, 1964, the petitioner was directed to reappear before the First June 1964 Grand Jury (before which he had originally executed the waiver and testified), but refused to give any testimony whatever, asserting his state and federal privilege. He was specifically asked:

> "in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers or policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York; did you?" (210 R. 16).

He again refused to reply and was thereupon brought before the Hon. CHARLES A. MARKS, Justice of the Supreme Court of the State of New York, the respondent herein, asked the identical question, and directed to answer. Although petitioner was warned of the consequences of a failure to comply, he steadfastly persisted in his refusal to respond upon constitutional grounds, and was adjudged guilty of criminal contempt (210 R. 17-18). The respondent judge, however, delayed execution of the sentence for a week, in order to give petitioner's counsel time to prepare and submit a memorandum, and asked for argument before the imposition of sentence (210 R. 18-19). That argument took place the following week, and principally concerned whether the recent decision in *Malloy* v. *Hogan*, 378 U. S.

1 (1964), nullified an earlier decision, *Regan* v. *New York*, 349 U. S. 58 (1955) (210 R. 27-37). The judge adhered to his ruling finding petitioner in contempt and sentenced him to thirty days in civil jail and fined him two hundred and fifty dollars (210 R. 37).

Upon the application of his attorneys, execution of petitioner's sentence was postponed for five days for the purpose of applying to the Appellate Division for a stay pending appeal (210 R. 37-8). On August 4, 1964, the Hon. BERNARD BOTEIN, Presiding Justice of the Appellate Division, First Department, refused to grant the stay, and shortly thereafter the petitioner was incarcerated (210 R. 51).

While petitioner was serving his thirty-day sentence, he applied to the United States District Court for the Southern District of New York for a writ of habeas corpus, alleging that his privilege against self-incrimination and right to counsel had been violated in the state court proceedings (290 R. 57). The Hon. WILLIAM B. HERLANDS, Judge of the District Court, denied the petition on the basis that petitioner had failed to exhaust his available state remedies (28 U. S. C. §2254), and noted, in this regard, that an appeal was then pending before the Appellate Division [234 F. Supp. 25 (1964)] (290 R. 39-42).

The appeal referred to by Judge Herlands was ultimately decided on October 30, 1964, when the Appellate Division dismissed his petition seeking an annulment of the contempt conviction and remission of the fine, citing this Court's decision in *Regan* v. *New York*, 349 U. S. 58, *supra*, as controlling. One circumstanced as the petitioner, the

Appellate Division held, must await the eventuality of a subsequent prosecution to test the pertinency of *Malloy* v. *Hogan*, 378 U. S. 1, *supra* (210 R. 42-3).

Leave to appeal this decision to the Court of Appeals was denied both by the Appellate Division (210 R. 55) and the Court of Appeals (210 R. 56).

A petition for certiorari was granted by this Court on October 11, 1965, and the case enumerated No. 210 on the Court's calendar (210 R. 57-8).

The Second Contempt Conviction

On September 28, 1964, the petitioner was haled for the third time before the First June 1964 Grand Jury, again refused to answer the same question as before, and was, consequently, adjudged in criminal contempt of court by the Hon. MITCHELL D. SCHWEITZER, Justice of the New York State Supreme Court (290 R. 45-6, 57). He was once again accorded a stay of execution of sentence in order to apply to the Appellate Division for a stay pending appeal. Instead, however, he attempted to remove the proceedings to the Federal District Court pursuant to 28 U. S. C. §1443, claiming his constitutional rights had been abridged. The Hon. LLOYD F. MACMAHON, Judge of the District Court, relying on the *Regan* decision, dismissed his petition, indicating that petitioner could not do by indirection what he could not do directly, *i.e.*, test the validity of his waiver of immunity in advance of testifying, and further held that neither the relevant section of the charter nor the state constitutional provisions infringed upon any federal constitutional right (290 R. 59). Petitioner then served a

second thirty day sentence and paid another fine in the sum of two hundred and fifty dollars. No appeal having been taken from this conviction, it is not before this Court on certiorari.

The Third Contempt Conviction

On January 11, 1965, the petitioner was once again directed to appear before First June 1964 Grand Jury. He acknowledged that he had previously appeared before that body, had signed a waiver, and had been twice convicted of contempt for not responding to questions (290 R. 11-12). The nature of the inquiry was then restated and the petitioner was reminded that he was a "potential defendant," and that "regardless of what your lawyer may say * * * it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity" (290 R. 15-16).

After being given an opportunity to consult with counsel, the petitioner returned to the jury room and was asked the same question that he had been asked on his two previous appearances before that jury (290 R. 16). Once again he refused to answer, asserting his reliance on the Fifth, Sixth and Fourteenth Amendments to the Constitution. He was then brought before the Hon. MITCHELL D. SCHWEITZER, Justice of the Supreme Court, who directed him to respond. Upon his refusal to obey, he was summarily held in contempt for the third time, fined two hundred and fifty dollars, and sentenced to be imprisoned in civil jail for thirty days (290 R. 21-2).

After he had served his jail sentence but before he paid his fine, the petitioner sought habeas corpus in the United States District Court for the Southern District of New York. The Hon. EDWARD WEINFELD, Judge of the District Court, refused to issue the writ, holding that since he viewed the decision in *Regan* v. *New York,* 349 U. S. 58, *supra,* as dispositive, and that inasmuch as Stevens could petition this Court for a writ of certiorari (in the case which is presently enumerated No. 210 on the Court's calendar) "the District Court should not be called upon to divine whether *Regan* remains controlling authority" (290 R. 50).

An appeal was then expedited (290 R. 53) to the United States Court of Appeals for the Second Circuit. That court affirmed Judge Weinfeld's denial of the motion for habeas relief, holding that *Regan* v. *New York,* 349 U. S. 58, *supra,* had not been "weakened, much less *sub silento* overruled, by *Malloy* v. *Hogan,* 378 U. S. 1 (1964)" but rather "that on the very day *Malloy* was decided, the Supreme Court reaffirmed the basic premise on which *Regan* rests: valid immunity legislation permits a state to compel otherwise self-incriminating testimony. *Murphy* v. *Waterfront Commission,* 378 U. S. 52 (1964)." (290 R. 62-3.)

Thereafter on October 11, 1965, this Court granted certiorari, and the case appears on the Court Calendar as No. 290 (290 R. 65).

Summary of Argument

The merits of the issue upon which certiorari was granted were not drawn in question by the decisions below. Although persistently asserted, the claim was explicitly ruled out of the case on the strength of this Court's decision in *Regan* v. *New York*. If, as the petitioner suggests, the controlling effect of *Regan* has been abrogated, by subsequent decisions or otherwise, the underlying point is not thereby presented to this Court. For the wise and traditional tenets of jurisdiction counsel abstention where raw state law is challenged. Particularly where the provisions in issue are embodied in the Constitution of a state or Charter of a municipality, considerations of federal comity demand that the state tribunals have the first opportunity to pass upon alleged infirmities. And in the instant case, incipient lower court cases indicate that a meaningful construction of the provisions in question might be forthcoming which might obviate some of the challenges leveled against them.

The constitutional issue, moreover, is not ripe for consideration for another reason: the adjudication of contempt was lawful, regardless of the constitutionality of the provisions here challenged. Whether or not these provisions constrained the petitioner to execute a waiver of immunity, thus annulling the waiver, he was nonetheless obliged to answer the questions put to him by the grand jury. For he could not be injured by obedience of the court's direction. If the waiver was valid, he surely could not assert his privilege; if invalid, he was, as a potential defendant and by operation of Section 2447 of the New York Penal Law,

completely protected against use of his compelled testimony and immunized against criminal prosecution on account of any matter he might have revealed. In other words, *Regan*, its reasoning and conclusion, are sound and applicable. The recent decision of this Court in *Malloy* v. *Hogan*, the only asserted grounds for *Regan's* alleged demise, does not affect that decision, for the case was clearly decided as though the Fifth Amendment were binding upon the states. And the applicability of the privilege therein embodied, alters in no manner the rationale of the *Regan* doctrine.

But apart from these considerations, the Constitution and Charter provisions, fairly construed, are not incompatible with Fifth Amendment rights. The loss of state employment, after procedures affording due process of law, is not such an unreasonable threat as to constitute a "penalty" for the assertion of the privilege against self-incrimination. The public employee, no less than his counterpart in private endeavor, is surely accountable to his employers for the manner in which he discharges the responsibilities of his office. And such an accounting necessarily involves the risk of criminal prosecution for any crimes disclosed. Removal from office for failure candidly and fully to discuss his official performance is but a normal and reasonable action, warranted by a demonstrated lack of fitness.

Nor does the fact that the grand jury is the forum before which a public officer remains silent affect this conclusion. The availability of immunity before that body does not entitle the public servant to its benefits. For the public servant before the grand jury, unlike the private citizen, stands before the representatives of his employers: the

community. Consequently he owes them the same forthright accounting, regardless of peril, that any servant owes his master.

Moreover, he cannot assert the private citizen's claim to protection against "state action" requiring him to surrender "rights." As a servant of the state, the public officer *is* the state insofar as his official conduct is concerned. And the state, which can justly require its employees to yield certain constitutional rights incompatible with public employ, must be at least as free to investigate itself as is a private body. Therefore, as to internal managerial functions, the state should be regarded as under no special disabilities. The Constitution itself, concerned with the threat to private citizens from the abuse of public power, would appear to commend efforts of the state to ferret out and deter instances of such abuse among its own agents.

Finally, the waiver of immunity, valid upon its execution as the product of a voluntary choice, was not thereafter unilaterally revocable at will. Waivers of all sorts, inherent in the concepts of the rights themselves, are normally operative legal acts subject to withdrawals only upon cause shown. Moreover, where the execution of a waiver, freely and intelligently made, has occasioned a benefit not otherwise forthcoming, it is binding. Under the operation of New York law, the petitioner, as a potential defendant, derived a real and substantial advantage by reason of his waiver of immunity. But for that tender, he would not have been permitted to appear before the grand jury; once sworn, he had both the opportunity to learn the questions relevant to the inquiry, and, more importantly, the privilege to submit his version of the matter, including explana-

tions and extenuating factors which might have prevented his indictment. The jury being obligated to hear him as a sworn witness, he was no less bound to testify. Thus, even if he did not waive his privilege by his answers to preliminary questions—and he may have done so—he could not at that stage annul the operative waiver by which he gained entry to the forum.

POINT I

The constitutionality of provisions of the New York State Constitution and Charter of the City of New York was never drawn in question by the decisions of the courts below in either case, and hence the issue is not properly before this Court.

The petitioner, after executing a waiver of immunity before a grand jury, refused to testify, claiming the waiver was invalid, and was therefor adjudged in contempt of court. In 1955 this Court held, in *Regan* v. *New York*, 349 U. S. 58, that a witness, situated precisely as is petitioner herein, could not avoid his obligation to testify on the ground that his waiver of immunity had been illegally procured from him. Such a claim, the Court held, was not ripe until a prosecution was actually commenced on account of any matter to which the witness had testified under the waiver. Accordingly, when Stevens asserted before the Appellate Division, First Department, that he had been compelled to execute a waiver of immunity by reason of an unconstitutional mandate, and further, that he had been deprived of his right to consult with counsel, the state appellate court refused to consider his claim on its merits [22 App. Div. 2d 683]. The high court of New York,

in denying leave to appeal, implicitly recognized the controlling force of *Regan*. When the petitioner took his claim to the federal courts, seeking habeas corpus relief, those tribunals also declined to consider the merits of his constitutional claim, citing the *Regan* doctrine. Thus, the issue of whether the challenged provisions of the Constitution of the State of New York and the Charter of the City of New York offend the Constitution of the United States was not decided and, hence, is not drawn in question by the decisions below. Yet that is the very issue upon which this Court granted certiorari.

That both courts below to whom certiorari was directed decided the issue exclusively on the strength of *Regan* v. *New York* (*supra*) and never reached the question upon which certiorari was granted is clear from relevant portions of their opinions. The Appellate Division of the New York Supreme Court, First Department (22 App. Div. 2d 683) (210 R. 43) wrote:

> "In view of our conclusion that *Regan* v. *New York* is controlling here, we do not reach the question as to the effect of *Mallory* [*sic*] v. *Hogan*, 378 U. S. 1, and *Escobedo* v. *Illinois*, 378 U. S. 478, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position."

Judge WEINFELD, of the United States District Court for the Southern District of New York, stated [239 F. Supp. 419 (S. D. N. Y. 1965)] (290 R. 48-9):

> "Finally, petitioner's success depends upon reconsideration of a Supreme Court decision which, so long

> as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim."

Judge Weinfeld was also referring to *Regan* v. *New York*. Judge KAUFMAN, writing for the United States Circuit Court for the Second Circuit, noted that he did not regard *Regan* "as having been weakened, much less *sub silentio* overruled, by *Malloy* v. *Hogan*, 378 U. S. 1 (1964)." The court noted as "significant" Justice REED's "exposition of the decision's rationale in *Regan*": "The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify" (349 U. S. at 64). "That holding," the Second Circuit went on to say, "its force unimpaired by intervening decisions, is dispositive of Stevens' claims" [345 F. 2d 305 (2d Cir. 1965)] (290 R. 61).

Because certiorari on the question appeared to have been prematurely granted, respondent moved for a reconsideration of the petition. The motion was denied. Nonetheless we renew the point, for it would seem unwise as well as unwarranted for this Court to adjudicate the constitutionality of a provision of a state Constitution where there has been no opportunity for the state courts to consider the issue, or to construe its own Constitution, either in this or any other case.

To sustain certiorari jurisdiction, a federal issue must be drawn in question by the lower court decision upon which review is sought. This tenet is so basic and virtually self-evident that extensive recourse to authorities is perhaps unnecessary. Yet, several cases in this Court deserve mention. In *Musser* v. *Utah*, 333 U. S. 95 (1948), the

Court, after discovering on oral argument a possible defect of vagueness in a state statute, remanded the matter for state consideration of the issue, declaring, "We believe we should not pass upon the questions raised here until the Supreme Court of Utah has had opportunity to deal with this ultimate issue of federal law and with any state law questions relevant to it." (*Id.*, at p. 98.) In *Adler* v. *Board of Education*, 342 U. S. 485, 496 (1952), the appellants in this Court urged for the first time that the state statute was unconstitutionally vague. The Court replied simply, "The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so [citations omitted]." A footnote to Mr. Justice Clark's opinion in *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956), note 2 at p. 555, explains that probable jurisdiction there was noted only after the New York Court of Appeals amended its remittitur to state that a federal question had been presented and passed upon [*Daniman* v. *Board of Education*, 307 N. Y. 806 (1954)]. In companion cases involving the same issue, this Court granted a motion to dismiss the appeal "for want of a properly presented federal question" in view of the New York Court of Appeals refusal similarly to amend the remittitur as to those defendants [*Daniman* v. *Board of Education*, 307 N. Y. 806 (1954); 348 U. S. 933 (1955)].

In *Griffin* v. *California*, 380 U. S. 609 (1965), the Court was called upon to determine whether a provision in the California State Constitution, allowing a prosecutor the privilege of commenting upon an accused's failure to testify, violated the self-incrimination clause of the Fifth Amendment made applicable to the states by the Four-

teenth Amendment [*Malloy* v. *Hogan*, 378 U. S. 1 (1964)]. Although *Griffin* had been decided by the California Supreme Court before *Malloy*, thus preventing that court from giving consideration to the federal question, both the majority and dissenting opinions in this Court took pains to point out, by way of footnotes, that a state court had adjudicated the federal issue in a later decision [*People* v. *Modesto*, 62 Cal. 2d 452 (1965) (TRAYNOR, C.J.)]. In the present case, by contrast, no such state adjudication of the federal issue occurred in any matter.

In arguing that the case is properly before this Court (brief, Point I, pp. 19-32), petitioner strives to demonstrate that *Regan* is no longer controlling authority. Stressing that *Malloy* brought the Fifth Amendment privilege to bear on state procedures, he views the authority of *Regan* as thereby destroyed. Apart from the flaws in this reasoning (see Point II, pp. 25-27, *infra*), it fails to support his major point. For even if the petitioner is right and *Regan* has been fatally undercut, the result must be a remand of the constitutional issue to the state courts which mistakenly, albeit justifiably, relied upon the allegedly defunct *Regan* doctrine exclusively.

In other words, the most persuasive demonstration of the demise of *Regan* would not draw in issue the merits of the question upon which certiorari was granted; that can only be done by an adjudication of the issue by the courts below.

POINT II

The question as to the validity of a waiver of immunity should not be litigated in an action for contempt; it must be reserved until such time as the witness may be prosecuted on account of evidence he may give thereunder.

Petitioner, from the court of first instance all the way to this High Tribunal, has sought to excuse his refusal to testify upon the grounds that the waiver of immunity which he executed before the grand jury is invalid, having been procured by duress. Inasmuch as the waiver is invalid, or so runs his argument, he could not be compelled thereunder to testify against himself. Necessarily, therefore he is seeking reconsideration of an earlier case decided by this Court, *Regan* v. *New York,* 349 U. S. 58 (1955), which held that the putative invalidity of a waiver of immunity is no defense to an action for contempt of court for failure to testify; but the waiver's invalidity could be properly raised in any future prosecution for criminal activity which might be revealed by his testimony. Because that case is factually indistinguishable from the present one, it has been considered dispositive by every court below. It should be held controlling here as well.

That decision was posited upon the existence of a valid state immunity statute affording complete protection for a witness within its scope; because of the immunity statute, a witness is obliged to testify when directed to do so. If the petitioner in that case had not executed a waiver of immunity, he could unquestionably have been compelled to testify, since by operation of law he would,

under such circumstances, receive immunity. Thus, the Court sensibly concluded, even if the waiver were, as Regan claimed, an utter nullity, he would, as any non-waiving witness, be completely immunized, and hence required to testify. Of course, if Regan was wrong and the waiver was binding, the privilege was no longer available and he could not refuse to answer questions with impunity. The Court found no reason for determining the issue of the validity of the waiver in the midst of a grand jury proceeding, since the witness could be compelled to testify regardless; the conviction for contempt was therefore warranted.

Precisely the same seamless logic assures the constitutionality of the present petitioner's conviction for contempt without prior adjudication of the validity of his waiver of immunity. For as with Regan, Stevens was legally obligated to answer questions as directed, regardless of the merits of his contentions concerning the waiver. If the waiver was operable, he had surrendered the privilege and was contumaceous in persistently asserting it. If, on the other hand, the waiver was, as he claims, a nullity, then under New York law (Penal Law, §2447), the overriding of his assertion of the privilege by a direction to answer effectively and completely immunized him against future prosecution or the use against him of any testimony thus compelled.

The Appellate Division below, in defining the scope of Section 2447, as applied to the petitioner's case, wrote (210 R. 43): "If the waiver were invalid, petitioner would have received immunity from prosecution under Sections 381 and 2447, Penal Law." It is for this reason that

Regan was deemed controlling. Therefore, notwithstanding certain procedural departures from the letter of the statute, the law of this case, and the interpretation of New York's immunity laws binding upon this Court, is that the petitioner would have received complete immunity even as Regan did. Moreover, this reading of the pertinent provisions of New York law was explicitly and independently adopted by the Second Circuit Court of Appeals below (290 R. 61): "Indeed, if Stevens' waiver is defective * * * as we view relevant provisions of the state penal law, immunity from prosecution will automatically follow." [Citing Sections 381(2) and 2447(1) of the New York Penal Law.]

The only distinction that might be drawn between the *Regan* case and the present situation is wholly without constitutional significance. When Regan appeared before the grand jury in 1953, whatever immunity he may have acquired was obtained automatically, by operation of law, without the necessity of an affirmative assertion of his privilege against self-incrimination [Penal Law, former §381]. A change in the law in 1953 placed upon the witness the obligation of interposing a refusal to testify before immunity may be conferred by a direction to answer [Penal Law, §§381, 2447]. Since this latter statutory procedure was followed in the instant case to accord Stevens the same immunity Regan might have acquired (had their waivers been void), the change of the law does not affect the authority of *Regan*. Indeed, interestingly enough, having complied with the procedures of Section 2447, the State of New York may have, all unwittingly, conferred upon the petitioner greater protection than that enjoyed by a witness testifying under

automatic immunity provisions. At least one lower federal court has held that a defendant in the federal court is accorded no testimonial exclusion of matters obtained from him in a state proceeding, unless such testimony is compelled over an assertion of the privilege [*United States* v. *Interborough Delicatessen Dealers Asso., Inc.*, 235 F. Supp. 230 (S. D. N. Y., 1964)]. Where, as Section 2447 requires, the state witness in the grand jury asserts the privilege and is directed to answer, therefore, he receives not only complete state immunity, but protection as well against the use of such testimony in a federal proceeding against him.

The petitioner rests his claim that *Regan* is no longer controlling authority primarily upon the advent of *Malloy* v. *Hogan*, 378 U. S. 1 (1964). The "climate," he asserts, has been so drastically altered by the applicability of the Fifth Amendment to state proceedings that the *Regan* doctrine has withered. His meteorological assessment, however, is faulty. In the first place, as Judge Kaufman pointed out in the opinion of the Court of Appeals, the *Regan* case was decided as though the Fifth Amendment were applicable to the states. In the Court's words (290 R. 62): "As we read the several opinions in *Regan*, the entire Court assumed, *arguendo*, that the self-incrimination clause could be utilized in state proceedings."

There is no doubt that the Fifth Amendment's protection may be waived, just as the state's identical privilege may be waived. And it is equally well established that the federal right may be withdrawn if supplanted with an immunity as broad as the privilege lost [*Counselman* v. *Hitchcock*, 142 U. S. 547 (1892)]. And there is no claim

here that, if the petitioner received immunity, that shield is not sufficiently broad.

Petitioner further asserts that a contempt prosecution has traditionally been the action in which to determine a witness's right to silence or obligation to testify. Thus, he argues, the *Regan* doctrine, which requires that adjudication to be held in abeyance pending a criminal prosecution, is so inconsistent with a multitude of holdings as to be erroneous.

In each case of the line referred to, however, the question has been the scope of the immunity accorded, not whether the witness receives it at all. For example, there has been much litigation concerning whether the immunity granted by one jurisdiction can protect the witness in another [see, *e.g.*, *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964); *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958); *Ullman* v. *United States*, 350 U. S. 422 (1956); *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Jack* v. *Kansas*, 199 U. S. 372 (1905)]. The witness in those cases was threatened by the very real possibility of a prosecution by another government based upon evidence which he gave to the jurisdiction according him immunity. His doubts on this score justified him in withholding his testimony, at least until his rights were delineated, for if the immunity conferred was not adequate he could not be compelled to testify. Under such circumstances, the contempt conviction must be reversed. Of course, the court might hold him well shielded, but in any case the issue in such cases truly is whether he could be compelled to surrender his privilege. And this issue must necessarily be adjudicated on the contempt citation.

Here, as in *Regan*, the presence of unquestionably adequate immunity legislation materially alters the picture. A witness who is assured by law that, if entitled to immunity at all, that protection will be as wide as he can be accorded may not refuse to testify. For whether he is entitled to immunity or—the only other possibility—has waived it, is beyond his control, and his refusal to answer as ordered must be deemed contumaceous. In other words, unlike the situation where it was possible to reverse the contempt conviction because the immunity was not coextensive with the privilege, the presence or lack of immunity here can not affect the validity of the citation for refusal to answer.

To dispose finally of the assertion that *Malloy* dealt a fatal blow to *Regan*, it must be pointed out that the scope of the requisite immunity is not broadened because it is the Fifth Amendment's privilege which is being supplanted. The federal derivation of the right to silence does not imply that the states must protect against federal prosecution if they seek to adduce testimony. This very argument, after all, was disposed of by this Court in *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964), on the same day that *Malloy* was announced. Ruling in favor of state immunity statutes which would otherwise perish, the Court wisely held that no violation of Fifth Amendment rights occurs if the state awards immunity to the full extent of its power to do so. This unfortunately can not extend to the federal realm, but the state witness, it was held, is adequately insured in the federal tribunal if evidence obtained under state compulsion is unavailable for use against him in that forum.

With noticeable stretch and strain, the petitioner asserts the invalidity of his conviction by reason of "entrapment." By this contortion he reaches the case of *Raley* v. *Ohio*, 360 U. S. 423 (1959) (brief, pp. 26-32). Upon a rather astonishing record, the Court there observed that all parties below seemed unaware that an automatic state immunity law deprived the witnesses before a legislative committee of their privilege against self-incrimination. Indeed, if it were otherwise, a most unseemly hoax was perpetrated on the witnesses, who were clearly led to believe that the privilege was available to them. Under those circumstances, to punish them for the assertion of the right that was proffered by the chairman is surely entrapment, bizarre though its form may be. In the instant case, the situation is so markedly different as to be virtually contrary: here petitioner was punished for his stubborn adherence to a claimed privilege which he was explicitly and repeatedly told was unavailable [210 R. 10, 13-14, 16, 18; 290 R. 14, 15].

That the prosecutor and the judge who directed the petitioner to answer may possibly have been mistaken as to why the privilege was unavailable can not bring this case within the *Raley* rule. If the legal theory of the prosecutor that the privilege was surrendered by waiver was wrong, the error could only redound to the benefit of the petitioner, had he complied with the court's direction. For, having wrested his privilege from the petitioner, the prosecutor could certainly not thereafter prosecute him on account of his testimony, claiming that he had not intended to confer immunity, or that the technical provisions of the operable statute had not been complied with. Of course, the petitioner could not, at that stage know

whether the prosecutor was wrong and whether he was, by operation of law, covertly obtaining immunity. But uncertainty and entrapment are creatures of altogether different hue. And the misleading advice, if such it was, or the uncertainty thereby induced, does not affect the federal question, so long as the constitutional right of silence was replaced by a coterminus cloak of immunity. And, to return to the refrain, it was here.

The petitioner's ambiguous expectation, moreover, could have no influence upon his legal position. The reason is clear: he was confronted with no choice of action which could affect his rights. Clearly, he was not obliged to stand fast upon his privilege in order to receive the benefits of immunity. Indeed, the two are inconsistent, since immunity is only received for testimony actually given. Nor had he any election to make concerning the execution of a waiver; that decision was behind him and had been made with full knowledge of his option. Thus, at the critical point in the proceedings, the petitioner faced but one course: obedience to the court's directive. That he may have had to follow that course with anxiety does not excuse him from following it.

There may remain a question of state law. For there are several New York cases which indicate that, as a matter of state law, a person might not be subject to penalties of contempt unless his refusal to answer questions was predicated on accurate advice concerning the consequences [see, *e.g.*, *People* v. *DeFeo*, 308 N. Y. 595 (1955); *People ex rel. Hofsaes* v. *Warden*, 302 N. Y. 403 (1951)]. But while the witness' mental state of uncertainty may affect the element

of willfulness which New York may deem an aspect of contempt, it is clear that the matter does not rise to a constitutional dimension. Indeed, in the *Regan* case itself, the question of uncertainty was considered and left to state determination (349 U. S. at 64).

Implicit in this Court's decision in *Regan* was the recognition of the necessity and importance of prompt obedience to the orders of a court where the party so directed cannot possibly be injured by compliance. Academic questions of future legal effects are properly relegated to a secondary position. For not all questions of legal consequences must be resolved at once to satisfy the appetite of the litigant for security. Justice frequently requires the efficient disposition of proceedings in progress, reserving the intermediate questions for future resolution. Thus, for example, interlocutory appeals are seldom allowed where the contested matter may be preserved for appeal from the judgment without the loss of rights. And so it is with the matter raised by the present petitioner. Losing no rights by testifying as directed, facilitating thereby the investigation in progress, and fully protected against future harm, he has, as *Regan* stated, no legal excuse for his defiance of the court.

In sum, the underlying premise of the *Regan* decision is eminently sound, and the case, under no infirmity by virtue of subsequent constitutional holdings or changes in the statutory law of New York, commends itself for reaffirmation. The judicial power of contempt, which this Court has often cautioned should be exercised with appropriate restraint, is nonetheless an indispensable adjunct

of the authority and dignity of the courts. Without the enforcement measure, judicial orders may be regarded by the recalcitrant recipient as but words upon the wind. And it requires no research in the library to discover that there are those, even among the highly placed, who would gladly defy court orders. It is not without reason that the blindfolded figure of justice holds not only the scales but the sword.

POINT III

The requirement that public officers disclose to a grand jury incriminatory matters pertaining to the performance of their offices is a fair and reasonable condition of continued public employment and is not repugnant to the Fifth or Fourteenth Amendments of the Constitution of the United States.

The Constitution of the State of New York, Article I, Section 6, while expressing the general precept that no person may be compelled to be a witness against himself, provides that should a "public officer" refuse to testify, or refuse to execute a waiver of the immunity he would otherwise obtain, before a grand jury, concerning the conduct of his office, he shall "be removed" from his office and be disqualified from public office or employment for five years. The New York City Charter, Section 1123, stipulates somewhat more broadly that, should any councilman, officer or employee of the City refuse to appear, execute a waiver of immunity, or testify before a court, legislative committee, or body authorized to inquire concerning the "nomination, election, appointment or official

conduct of any officer or employee" his term of office shall end, and he shall be ineligible for city employment.

Neither of these provisions have been authoritatively construed by the appellate courts of New York. But two things at least may safely be ventured. First, this Court, considering the nearly identical predecessor to the Charter provision, the former Section 903, in the case of *Slochower* v. *Board of Higher Education,* 350 U. S. 551 (1956), saw no constitutional defect on the face of the provision. Its application, however, was found offensive to due process where the assertion of the privilege before a Senate committee was, without more, the cause for summary dismissal. Second, the lower courts of New York, heeding the *Slochower* opinion, have viewed the dismissal feature of the provisions here at issue as requiring some sort of departmental hearing. For two officers dismissed summarily with the petitioner herein, and on the same basis, have been ordered reinstated [*Conlon* v. *Murphy,* —— App. Div. 2d ——, 263 N. Y. S. 2d 360 (1st Dept. 1965); *Matter of Gardner* v. *Murphy,* 46 Misc. 2d 728 (Sup. Ct. N. Y. Cty. 1965)]. The petitioner's pending suit for reinstatement may well have the same outcome. The summary manner of his discharge is not, of course, presently before this Court for review. But the significant point is that the action taken against him at the departmental level does not define the nature of the procedure to be followed under the Constitution or Charter mandate. It is extremely difficult to project the lines to be drawn judicially for administrative action. But for present purposes, this Court surely will not assume that the courts of New York will adopt an unconstitutional form of action where an alternative consistent with due

process under the Fourteenth Amendment is available. And it would seem, consistent with the opinion of the Court in *Slochower* and other cases, that a departmental procedure where the officer who has invoked his privilege has full opportunity to appear with counsel to answer pertinent questions or supply such explanations or circumstances as may demonstrate his fitness to retain office would satisfy constitutional demands. Hence the state provisions, subject to such construction, are not unconstitutional.

The petitioner contends, in essence, that the challenged provisions are unconstitutional, not because he has lost his office by their operation, but because the economic threat embodied therein compelled him to waive his privilege against self-incrimination. Actually his position, as he describes it, is far from clear. On the one hand, he views the threat of discharge from duty for reliance on the right of silence as "an effort to penalize and to inhibit a basic constitutional privilege" (brief, p. 38). In the same breath, however, he states: "These appeals from the two contempt convictions do not in any way involve or challenge any power New York may have to discipline or discharge petitioner or any other public employee for refusing to disclose information about the performance of his public duties" (*id.*). But the unchallenged power is the life of the challenged provisions of the Constitution and Charter. If petitioner is not entirely withdrawing his troops, he must be asserting merely that the codification of the undisputed authority itself constitutes the duress invalidating the waiver. But this is absurd; advance notice of lawful consequences is just, not coercive.

Yet, despite this puzzling paradox, a coherent argument emerges from the petitioner's point. The waiver, the argument goes, being the product of economic coercion is a nullity and the petitioner could not be compelled thereunder to answer self-incriminatory questions before a grand jury nor adjudicated in contempt for his failure to do so. Thus he claims in effect that by influencing him to incriminate himself, the law of New York offended his rights under the United States Constitution to remain silent. As a corollary, he asserts that by placing his livelihood in jeopardy, regardless of the procedures by which such forfeiture may be accomplished, a penalty is decreed by the State Constitution and City Charter which is proscribed by the Fifth Amendment itself. For in 1964, when this Court held the Fifth Amendment directly applicable to the states in *Malloy* v. *Hogan*, 878 U. S. 1, the privilege was defined thus by Mr. Justice BRENNAN: "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence" (378 U. S. at p. 8).

The heart of the issue thus posed is whether a waiver of immunity, executed in the shadow of the challenged provisions, is involuntary and hence invalid by reason of threatened unlawful penalty.

To begin, none can seriously doubt the inherent right of a private employer to seek from his employee the answers to questions, which may be incriminatory, bearing upon his fitness for his job. And the information thus furnished may provide the basis of prosecution since the employer has no power to confer immunity. The private employee so

interrogated may surely withhold reply, but the employer, having had no satisfaction, may just as certainly discharge the employee. To deliberate whether the cause of firing is merely the assertion of the privilege, the imputation of guilt, or the demonstrated lack of candor inconsistent with continued responsibility is a semantic exercise only. Realistically, assignment of cause cannot be essayed without reference to the question to which response was withheld. Obviously, there is a different degree of inference of misconduct from a refusal by a bank teller, for example, to say whether he is acquainted with any bookmaker, and his refusal to tell the Vice President whether he has been stealing from the till. But such reference to the question, though interesting and novel, is far afield, traditionally impermissible, and of no consequences for present purposes. For in any case, the bank officer would be remiss in his obligations to depositors if he did not remove the recalcitrant teller from further responsibilities. And none could justly complain that the forfeit of his job trammeled the employee's rights under the Fifth Amendment.

Does the state, through its administrative officers, have any less power over its servants? True, the Constitution, by its terms, restrains not private persons but states from the abridgement of rights. And the old maxim that no man has the constitutional right to work for the state has come to mean simply that the government employee "must comply with reasonable lawful and non-discriminatory terms laid down by the proper authorities" [*Slochower* v. *Board of Higher Education*, 350 U. S. 551, 555 (*supra*)]. Or, as stated in *Wieman* v. *Updegraff*, 344 U. S. 183 (1952),

and conceded by petitioner (brief, p. 39), the public servant may be excluded from employment only by regulations which are neither "patently arbitrary" nor "discriminatory." Thus, though the state is under special injunction to protect the rights of all, it is not without authority to lay down reasonable terms of employment.

In this connection, it may be well to observe the distinction between the state *qua* state and the state *qua* employer.* The exercise of state power through its employees against the private citizen is the main concern of constitutional safeguards. But no such considerations govern the management by a state of its internal affairs. Indeed, a limitation of the state's powers to regulate the conduct of its own employees is inconsistent with the private citizen's interest in the proper and restrained external exercise of state power. There is nothing abstruse in this proposition. Concretely, curtailment of the abuse of authority by a police officer is as much in the interest of protecting citizen's rights as the exclusion of evidence unlawfully obtained. Thus, it becomes a higher responsibility for the public than the private employer to probe the conduct of official duties by its employees. And in such a managerial role, the state regulating itself should not be disadvantaged by the constitutional concerns with "state action."

Furthermore, despite the restraints on state abridgment of constitutional rights, this Court has consistently recognized that obtaining or retention of governmental or quasi-official posts may involve the relinquishment of certain con-

* *Cf., New York* v. *United States,* 326 U. S. 572 (1946); *Ohio* v. *Helvering,* 292 U. S. 360, 369 (1934); *South Carolina* v. *United States,* 199 U. S. 437 (1905); *Lloyd* v. *Mayor &c. of New York,* 5 N. Y. 369, 374 (1851).

stitutional rights, at least to the extent that the invocation of those rights might be incompatible with the nature of the employment.

Both the state and federal government have curtailed the exercise of the First Amendment rights of freedom of speech and association, where its assertion would interfere with some valid governmental interest. Thus teachers who refused to disclose whether or not they were members of the Communist Party were rightfully dismissed; their failure to answer before a committee investigating fitness branding them as "unsuitable" for further public service [see *e.g. Garner* v. *Los Angeles Board,* 341 U. S. 716 (1951); *Adler* v. *Board of Education,* 342 U. S. 485 (1952); *Beilan* v. *Board of Education,* 357 U. S. 399 (1958); *Nelson* v. *Los Angeles County,* 362 U. S. 1 (1960)]. Similarly, in the interests of governmental integrity, federal civil service employees are forbidden to participate in certain political activities [*United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947); *Ex Parte Curtis,* 106 U. S. 371 (1882)]. In another situation it has been held that applicants for admission to the bar must satisfy a board of examiners that they are persons of high moral character worthy to practice law, even if in so doing they must reveal past associations they do not care to disclose [see *e.g. In re Anastaplo,* 366 U. S. 82 (1959); *Konigsberg* v. *State Bar of California,* 366 U. S. 36 (1961)]. However, a candidate cannot be excluded merely for asserting his First Amendment privilege [*Schware* v. *Board of Bar Examiners of New Mexico,* 353 U. S. 232 (1957); *Konigsberg* v. *State Bar of California,* 353 U. S. 252 (1952)].

As to the Fourth Amendment: undoubtedly certain government personnel, such as those working in the Mint, are subject—as an incident of their employment and without warrant or probable cause—to searches of their persons upon entering or leaving particular premises.

Equally necessary for the protection of a valid governmental interest is the disclosure of criminal activities within the government itself, regardless of whether responsibility falls upon the witness or not. Thus, the state may reasonably condition continued public service upon the relinquishment of a Fifth Amendment right. The condition is particularly justifiable where the nature of the employment is such that the concealment constitutes a virtual renunciation of office [see, Ratner, "Consequences of Exercising the Privilege Against Self-Incrimination," 24 U. of Chi. L. Rev. 427, 503 (1957)]. The disclosure of crime is the police officer's job and shielding a perpetrator from prosecution is dereliction of duty. For them at least, then, employment conditioned on a waiver of the right to silence is pre-eminently reasonable. [See, *Christal* v. *Police Commissioner,* 33 Cal. App. 2d 564, 92 P. 2d 416 (1939); *Drury* v. *Hurley,* 339 Ill. App. 33, 88 N. E. 2d 728 (2d Div. 1949); *State* v. *Nagler,* 44 N. J. 209, 207 A. 2d 689 (1965).]

It would therefore seem both just and reasonable for a municipal department head to question a member of his department concerning his duties, and discharge him for failure to supply answers consistent with his fitness to carry his responsibilities. As with the private employer, the public official has no authority to confer immunity and answers must be given, if at all, under threat of prosecution for any crimes they may reveal. Full protection against

such self-incrimination is afforded by recourse to unbreakable silence. But the consequences must be no different than those faced by the silent employee of a private enterprise.

This is particularly true of military or quasi-military organizations. In 1953, a medical doctor conscripted into the army refused, on grounds of self-incrimination, to disclose past affiliations with the Communist Party. He was, consequently, refused a commission and assigned a technician's post. He sued out a writ of habeas corpus to secure his release from the armed services on the grounds that he was being punished for asserting his Fifth Amendment privilege. It was held:

> "It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question 'No'." [*Orloff* v. *Willoughby*, 345 U. S. 83 (1953)].

The question then becomes whether the result is altered by a change of forum to a grand jury which has the power to confer immunity. At the outset, it must be recognized that the prime function of the grand jury, unlike the municipal department head, is to investigate crime and charge the perpetrators. But the grand jury has an equally important, if secondary, role. Historically, the grand jury

has provided the community at large with a vital supervisory agency over the affairs of government [N. Y. State Const. Art. 1, §6]. And the public official stands before the grand jury, in a real sense, before his employers. Employed by the community, the public officer is responsible to them and to their representatives. Thus, unlike the ordinary potential defendant, a police officer before the jury is facing his civilian employers. They have the same right to demand an accounting of his performance of his public trust as does his executive superior. By virtue of their special power in certain cases to confer immunity, should the public officer be entitled to demand the protection from prosecution in return for his answers which is available to no other employee facing the questions of his employer? We think not. Nor do we believe that the law, in requiring the waiver of such immunity before that body is unjust.

In a case closely analogous to the one at bar [*United States ex rel. Laino* v. *Warden of Wallkill Prison*, 246 F. Supp. 72 (S. D. N. Y., 1965)] the court (TENNEY, J.) held that a General Municipal Law requirement that public contractors waive immunity before investigative bodies on sanction of possible disqualification from receiving contracts with municipalities did not violate the petitioner's federal privilege against self-incrimination, nor had he been compelled, in a federal constitutional sense, to give testimony against himself. Judge Tenney observed that:

> "The state has a legitimate interest in excluding from office those who would impair efficiency and honesty in governmental operations. This cannot be doubted. To achieve this end conditions and penalties can be imposed even where they may involve the relinquishment of constitutional rights and privileges,

> so long as they bear a reasonable relation to the end sought to be achieved."

Nor has the newly-announced applicability of the Fifth Amendment to the States effected any change:

> "I see no reason for this Court to hold that Malloy v. Hogan, 378 U. S. 1 (1964) has, in effect, wiped out the prior decisions of the Supreme Court which held comparable statutory enactments valid, though prior to the Malloy decision. The state's vital interest in its employees and persons doing business with it who occupy a position of trust is no less now than prior to Malloy. Of prime importance, however, is the fact that what Malloy proscribes is not waiver of immunity statutes, but rather dismissal (a disqualification) predicated solely upon one's invocation of the Fifth Amendment privilege." (*United States ex rel. Laino* v. *Warden, supra,* at p. 95)

The power to initiate criminal prosecution lies with the executive superior as it does with the grand jury, although the former is one step further removed from the actual commencement of an action at law. Placing the public servant directly before the jury under a waiver, then, merely transfers the inherent power of the employer to prosecute from one agency of the state to another. There can be no loss of rights by the employee by virtue of such transfer. Nor does the requirement of disclosure deprive the officer of the constitutional right of silence. It rather translates into law the fact that such reluctance to cooperate and furnish a satisfactory accounting is incompatible with continued exercise of public responsibility.* Indeed, it

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* For similar state statutes or constitutional provisions, see:

La. Const., Art. XIV §15(P)(1); N. J. Stat. Ann. 2A:81-17.1 (Supp. 1964); D. C. Code §1-319 (Supp. 1958).

would be little short of absurd to decree that failure of a police officer to answer whether he received bribes and face criminal consequences must leave the police commissioner helpless to effect a change in the officer's employment without running afoul of the "penalty" proscription.

Nor can it be validly claimed that the public officer before the jury is in a dual capacity, his rights as a threatened private citizen adhering notwithstanding his public position. This argument might be urged if the waiver covered his private affairs, but in fact it is scrupulously limited to official acts. As to such behavior, the witness before the grand jury is the state incarnate. And the proceeding can not be viewed as the forces of the state arrayed against the individual citizen, but rather as the whole examining its own inseparable part. Obviously, so viewed, the constitutional inhibitions on state power must be diminished.

POINT IV

The waiver of immunity, having been freely and voluntarily executed by Stevens, could not be unilaterally withdrawn and replaced by a revived privilege against self-incrimination.

The distillate of the issue underlying Stevens' conviction funnels to the question of whether his waiver of immunity was binding upon him throughout his testimony or revocable by him at any point. It is a difficult and complicated question, involving a consideration of the nature of waivers generally and a study of immunity as accorded by the law of New York.

Waiver is an indispensable constituent in the concept of a right; without it, a right becomes a duty. The law bestows upon citizens rights of various sorts, and all, including the most precious of those enshrined in the Constitution, may be declined. The enjoyment of a right is the exercise of an option implying the equal validity of its refusal. Traditionally, operative waiver of a right requires understanding of its availability and the consequences of self-divestment. [See, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).] Thus, the right to trial of a criminal charge, to representation, to confrontation, and to a jury, as well as to remain silent, may be intelligently yielded.

In law, moreover, the understanding adult is normally deemed bound by his elections. Acts and declarations are not easily undone where no new factors require reconsideration of the original choice. And the execution of a waiver imports legal consequences which are often irreversible.

In the case of a waiver of immunity under the law of New York, such consequences preclude revocation. Its execution entitles a potential defendant to appear before a grand jury [N. Y. Code Crim. Proc., §250(2)]. This accords him the opportunity to hear and answer allegations made against him, to put forward explanations or extenuating circumstances which may move the grand jury to favorable disposition. That the decision to appear and testify may, on reconsideration, appear unwise, does not justify withdrawal of the undertaking by which the entry to the forum was gained. The witness is bound to complete his testimony, just as the prosecutor and jury are obligated to hear him. Accordingly, it has been held

by the New York Court of Appeals that the waiver, once executed, may not be cancelled [*People ex rel. Hofsaes* v. *Warden*, 302 N. Y. 403 (1951); *accord, United States ex rel. Laino* v. *Warden*, 246 F. Supp. 72, 99-100 (S. D. N. Y. 1965)]. In this respect the situation of the potential defendant before the grand jury is analogous to that of an accused in a criminal trial who is similarly privileged to refrain from testifying. Once a defendant takes the stand, however, the privilege is completely waived and he is bound to speak [8 Wigmore, Evidence §2276(2) (3d Ed., 1940)].

It might be argued that the obligation to answer incriminating questions does not attach until the witness has responded to some questions along the same line of inquiry. Under established doctrine, the privilege is lost by failure to assert it when the testimonial foot is first set upon the path to incrimination. Although waiver by operation of this principle is not the gist of the present issue, Stevens, by acknowledging his rank and position in the police force and agreeing to fill out a financial questionaire (210 R. 11), may well have opened the way to inquiry concerning his corrupt performance of duty in that capacity. However, it is often a delicate matter to determine the precise point at which the privilege is waived by response, and it is partly for this reason that the expedient of prior acknowledgment of a willingness and desire to testify without benefit of privilege, is a fair and wise procedure in the context of a grand jury investigation. [See, *Rogers* v. *United States*, 340 U. S. 367 (1951).] But the waiver of immunity is far more than a mere gratuitous statement of intention, unilaterally offered, and hence revocable at will.

To appreciate the character and significance of the waiver of immunity, some exploration of the confused and often misunderstood law of New York is unavoidable. Prior to the enactment of Section 2447 of the New York Penal law in 1953, immunity, at least where a crime was being investigated for which immunity could be accorded, was a relatively simple matter. Anyone called as a witness, whether thought to be a "target" or not, automatically received full immunity from prosecution concerning any matter about which he gave responsive answers [Penal Law, former §381]. He was not required to assert any privilege or be ordered to answer any particular question. Thus, no man needed fear that his testimony might afford the basis of prosecution. Of course, once called and thereby fully and automatically protected, he was required to testify and testify truthfully, for no witness was immunized against a contempt or perjury charge on the basis of his conduct as a witness.

Under these circumstances, the waiver of immunity had real meaning. A witness who desired to tell his story, as a defendant on trial, could give in exchange for that opportunity a waiver which from the outset precluded the operation of the automatic immunity. Indeed, it was the only way in which immunity could be waived.

Section 2447 was avowedly intended to accord a benefit to the prosecution. In order to preclude an unwitting immunization, the prosecution was entitled to an affirmative notice by the witness that he believed the answer to a particular question would tend to incriminate him. Thus alerted, it was felt by the framers, the nodding investiga-

tor had the chance to reconsider whether to press for an answer, thereby immunizing his witness. For, the statute provides, the only manner in which such immunity may be conferred is by overriding the assertion of the privilege by a direction to answer. In a grand jury context, this requires a request of the district attorney, a vote of the jury, and as the cases have held, an explanation to the witness that he is fully immunized [*People* v. *DeFeo*, 308 N. Y. 595 (1955)]. The witness is then immunized to the extent that he, in compliance with the order, answers or produces evidence. The immunity is conferred in exchange for the evidence.

Here the legal significance of a waiver of immunity may appear somewhat obscure. Under Section 2447, the most natural manner for a witness to waive immunity would seem to be simply to refrain from asserting his privilege. (Indeed, this seems to be the federal practice under their comparable immunity provisions. *E.g.*, 70 Stat. 574, 18 U. S. C. 1406.) The "waiver" executed in advance of testimony, then, might be deemed a mere unilateral promise to abstain from future assertion of the privilege. Of such scant legal significance, the waiver might be thought of as a relic only, an empty formality which could not bind the witness in derogation of his valuable privilege. Such, however, is not the case.

In 1959, in a brief and somewhat mystifying opinion, the New York Court of Appeals, 4-3, held that the potential defendant, called before a grand jury, receives from the moment of his oath protection against use of or indictment based upon his testimony [*People* v. *Steuding & Ryan*, 6 N. Y. 2d 214]. The provisions of Section 2447, it was held,

apply only to bona fide witnesses and do not detract from the automatic protection acquired by "targets" directly from the State Constitution. By returning potential defendants to the pre-2447 stage (and, realistically, immunity is a factor only in the testimony of potential defendants), the Court of Appeals revitalized the efficacy of the waiver of immunity. The waiver is, then, an operative instrument despite the holdings of cases following *Steuding* that immunity, in the full sense of the term, was not acquired by the target simply as a result of being sworn to testify [*People* v. *Laino*, 10 N. Y. 2d 161 (1961); *People* v. *Ryan*, 11 A. D. 2d 155 (1960) and 12 A. D. 2d 841 (1961) (upholding reindictment and conviction of defendant in *Steuding*)].

The wording of the waiver which Stevens executed (210 R.), while derived from the rather moribund Section 2446 of the Penal Law, is sufficiently broad to waive also whatever protection he would otherwise be accorded by operation of the *Steuding* doctrine. And, although the ritual dictated by Section 2447 is customarily followed, it is evident that *Steuding* type protection would attach when the oath is first administered. It is for this reason that a witness such as Stevens is informed at the outset that he is a potential defendant, apprised of the nature of the investigation, and advised of the option and its significance (210 R. 9-10, 13-15). It is only upon his recorded understanding and acknowledgment of the waiver that he is sworn.

By taking the oath, he accepts both the benefits and the obligations of his waiver. For it is obvious that should he choose to enjoy his privilege of silence, he could not be permitted to testify. Since by swearing the potential defend-

ant, the jury would be conferring immunity, virtual or literal, they would rightly decline to hear one whom the evidence might warrant charging with a crime.

In this light, it can readily be seen that the waiver of immunity is a legally significant choice, and as such, should not be regarded as revocable at will. And one who avails himself, willingly and with full appreciation of the possible consequences, of the privilege of appearing before those who will assess his conduct, can not retain the privilege of silence as well. Stevens was bound to fulfill the obligation he undertook, just as all of us living under a system of laws must honor the vows we have understandingly made.

Conclusion

Since the designated issue was not drawn in issue by the decisions below, *certiorari should be dismissed* as improvidently granted;

or

Since the holding of *Malloy* v. *Hogan* leaves the rationale of the *Regan* case wholly unaffected, and since the instant case is indistinguishable from *Regan*, on the authority of that sound and just result, *the judgment should be affirmed;*

or

If *Regan* be, on some account, inapplicable, *the cause should be remanded to the state court* for consideration of the merits of the contentions here raised;

or

Since the provisions of the New York Constitution and City Charter here challenged are not repugnant to the Constitution of the United States, and accordingly the petitioner's waiver of immunity was voluntarily executed, and was not thereafter unilaterally revocable, *the judgment should be affirmed.*

Respectfully submitted,

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